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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA  
RENO, NEVADA**

DENNIS WAYNE LIBRO,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY,

Defendant.

Case No.: **CV-N-00-0603-ECR (RAM)**

**DEFENDANT'S REPLY TO  
PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS  
PLAINTIFF'S SECOND CAUSE OF ACTION**

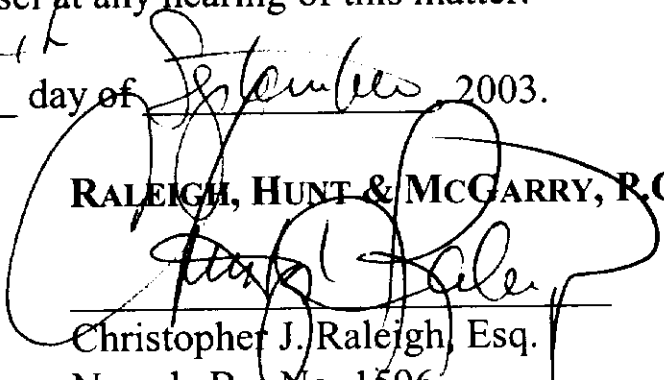
Defendant, Union Pacific Railroad Company (hereinafter "Defendant" or "UPRR"), by and through its attorney, Christopher J. Raleigh, Esq. of the law firm RALEIGH, HUNT & MCGARRY, P.C., hereby submits its Reply to *Plaintiff's Opposition to Defendant's Motion to Dismiss Plaintiff's Second Cause of Action* dated September 5, 2003 ("Opposition"). This

89

1 Reply is made and based upon the pleadings and papers on file herein, the following points and  
2 authorities, and the argument of counsel at any hearing of this matter.

3 Respectfully submitted this 11<sup>th</sup> day of September 2003.

4 **RALEIGH, HUNT & MCGARRY, P.C.**

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11 **POINTS & AUTHORITIES**

12 **I.**  
13 **REPLY**

- 14 1. **A jurisdictional issue is present here because Plaintiff's SAA claim did not arise**  
15 **from the conduct, transaction, or occurrence set forth in Plaintiff's original**  
16 **pleading.**

17 With citation to Fed.R.Civ.P. 15(c)(2), Plaintiff argues:

18 There is no statute of limitations issue here, because a fundamental rule of  
19 pleading is that, "An amendment of a pleading relates back to the date of the  
20 original pleading when ... the claim... asserted in the amended pleading arose out  
21 of the conduct, transaction, or occurrence set forth or attempted to be set forth in  
22 the original pleading."

23 See Opposition, 2:18-22. This fundamental rule, however, is not applicable here. The reason  
24 is simple, Plaintiff's original complaint only involved allegations UPRR "negligently ... caused  
to be placed, a spike in a track switch plaintiff was required to throw, without warning  
thereof...." See *Complaint for Damages*, at ¶ V.

Plaintiff's original *Complaint for Damages* contained one cause of action, i.e., violation

1 of the FELA. As partially addressed above, as follows in his original pleading, Plaintiff alleged:

2 That on January 4, 1998, in Elko, Nevada, plaintiff was working in the course and  
 3 scope of his employment; that plaintiff was engaged in the work duties of as a  
 4 train conductor; that defendant owed to plaintiff the duties of exercising ordinary  
 5 care to provide plaintiff with a reasonably safe place in which to work, to provide  
 6 plaintiff with reasonably safe tools and equipment for the performance of said  
 7 work and for the movement of trans onto secured side tracks, to inspect and  
 8 maintain its track switches and to ensure said switches are in a proper and safe  
 9 condition for switching; **that defendant, UNION PACIFIC RAILROAD**  
 10 **COMPANY, a corporation, through its agents, servants, and employees,**  
**other than plaintiff, carelessly and negligently failed in its aforesaid duties**  
**in that it placed, or cause to be placed, a spike in a track switch plaintiff was**  
**required to throw, without any warning thereof; that consequently, as**  
**plaintiff threw the switch it unexpectedly jerked to a stop before the throw**  
**was completed because of the placement of the spike, causing him to**  
**suddenly halt in mid-motion, thereby causing him to suffer the injuries**  
**hereinafter set forth.**

11 *Id.*, ¶ V, at 2:14-28 (bold emphasis added). The *Complaint for Damages* does not allege any  
 12 SAA claim or even reference there was an alleged safety appliance defect. In fact, the  
 13 Complaint is devoid of any such reference. The entire focus of the *Complaint for Damages* was  
 14 on the switch and the spike allegedly left therein.

15 Simply put, the conduct, transaction, or occurrence set forth in Libro's original pleading  
 16 involved the switch and spike, not an alleged SAA violation. Moreover, the original complaint  
 17 did not place UPRR on notice of any SAA claim. Therefore, there is no basis to apply the  
 18 fundamental rule Plaintiff touts. As a consequence, there is a jurisdictional defect with  
 19 Plaintiff's SAA claim in that it was not initiated within three (3) years.  
 20

21 **2. Plaintiff's contention he did bring an SAA claim in his original pleading is not**  
 22 **born-out by his actions.**

23 Plaintiff argues:  
 24

1 Moreover, plaintiff brought his action under the SAA in his original complaint  
2 on page1, at lines 21 and 22 (Exhibit 2), but neglected to set for the specific  
3 underlying facts of the claim. The purpose of amending the complaint was to  
perfect the pleadings. Defendant's claim that it only became aware of the SAA  
claim after the statutory period ran, is utterly specious.

4 See Opposition, 2:28 to 3:4.

5 The reference to the SAA in Plaintiff's original pleading is made solely in the  
6 "jurisdiction and venue" section, along with the contention the action is for "personal injuries  
7 and wrongful death." Obviously, the case does not involve wrongful death. No claim was  
8 alleged for wrongful death. No claim was alleged for SAA violation, nor was it even hinted at,  
9 as is more fully addressed above.

10 Plaintiff's contention his amendment was merely to "perfect the pleadings" is not  
11 supported by the facts. If Plaintiff truly believed he had a SAA claim from the outset, one  
12 would think he would have been developing his case accordingly, from the outset. He did not.  
13 In fact, it was only *after* he was granted leave to amend to assert an SAA claim did he begin to  
14 develop an SAA claim. For instance, it was only after discovery was reopened after leave to  
15 amend was granted did Plaintiff name SAA liability experts.

17 Still further, the day after the incident, Plaintiff stated the cause of the incident was a  
18 "spike in switch plate next to switch points" and, as to what, if any, equipment or tools  
19 contributed to the incident, Libro stated "Switch leading into yd 23 trk. 471 west end had spike  
20 set loosely in hole on switch plate next to switch points." See Libro's Report of Personal Injury  
21 or Illness completed January 5, 1998, at § II, ¶¶ 11-12.

1 Similarly, when asked at his deposition approximately forty-five (45) months after the  
 2 incident, Libro again stated he didn't believe the incident was caused by unsafe tools<sup>1</sup> and he  
 3 was not claiming the incident was caused by any unsafe equipment, other than the switch.<sup>2</sup> See  
 4 Libro's 9/14/01 depo, pgs. 27-29. Libro went on to state, in his opinion, the incident was caused  
 5 by nothing other than the fact that there was a spike somehow in the switch hole.<sup>3</sup> Id. He also  
 6 said there were no other mechanical or procedural problems which lead to the incident.<sup>4</sup> Id.  
 7 Therefore, even 45 months after the incident, Libro is claiming the spike/switch was the only  
 8 cause of the incident. UPRR, accordingly, still had no reason to believe the case was anything  
 9 other than a case about a spike and switch, especially based upon Libro's own statement,  
 10 pleading, and deposition testimony.

11 It is clear Libro's reliance upon Fed.R.Civ.P. 15's relation back provision is misplaced.  
 12 As a consequence, jurisdiction is lacking for the SAA claim as it was not initiated within three  
 13 years of the January 4, 1998, incident. The SAA claim should, therefore, be dismissed.  
 14

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15  
 16  
 17 1 Q. Do you claim the accident was caused by any unsafe tool or tools?  
 18 A. No.

19 2 Q. Do you claim the accident was caused by any unsafe equipment?  
 20 A. The switch.

21 3 Q. Okay. In your opinion, was the accident caused by anything other than the  
 22 fact that there was a spike somehow in the switch hole?  
 23 A. No, I believe I did everything properly.

24 4 Q. Are there any other mechanical or procedural problems that you're aware  
 of that led to your accident?  
 A. None other than it should have been that it was spiked and it should have  
 been tagged and locked and I should have had forewarning of it in the track  
 warrants.

1     **3.     The “law of the case” doctrine doesn’t apply to this motion or the issue it raises.**

2             Plaintiff argues UPRR’s Motion should be denied as it runs afoul of the “law of the case”  
 3 doctrine. See Opposition, 13-24. Under that doctrine, a court is generally precluded from  
 4 reconsidering an issue that has already been decided by the same court or a higher court in the  
 5 same case. See United States v. Alexander, 106 F.3d 874, 876 (9th Cir.1997). The effect of the  
 6 doctrine is not dispositive, particularly when a court is reconsidering its own judgment, for the  
 7 law of the case “directs a court's discretion, it does not limit the tribunal's power.” Arizona v.  
 8 California, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983) See United States v.  
 9 Maybusher, 735 F.2d 366, 370 (9th Cir.1984).

10             Here, the issue is whether Plaintiff complied with the substantial obligation to initiate  
 11 his SAA claim within three (3) years of the January 4, 1998, incident. Plaintiff fails to cite any  
 12 Order addressing such an issue. The reason is simple: there is no such Order. As a  
 13 consequence, for this fundamental reason, the “law of the case” doctrine is inapplicable here.  
 14

15  
 16     **4.     Whether the Court found sufficient issues of material fact for the jury as to both**  
 17 **the FELA and SAA claims is irrelevant to the present motion.**

18             Plaintiff argues “[o]n February 21, 2003, the Court found there were sufficient issues of  
 19 material facts for the jury as to, both, the FELA and SAA claims.” See Opposition, 4:24-26.  
 20 Such a finding goes to the propriety of summary judgment. It has no impact upon whether  
 21 Plaintiff’s SAA claim was timely commenced. Therefore, this argument is inapplicable in the  
 22 context of UPRR’s current motion seeking dismissal of the SAA claim on jurisdictional  
 23 grounds.  
 24



1 **5. UPRR's Motion is timely.**

2 Plaintiff argues the deadline to file dispositive motions was May 23, 2002, and, as a  
 3 consequence, the present motion should be denied. See Opposition, 5:3-6. The present motion,  
 4 however, goes to the issue of jurisdiction.<sup>5</sup> It is provided in Rule 12(h) that a motion to dismiss  
 5 for lack of jurisdiction may be made at any time. Corcoran v. Royal Development Co., 35  
 6 F.Supp. 400 (D.C.N.Y. 1940), affirmed, 121 F.2d 957 (2<sup>nd</sup> Cir. 1941); Louisville & N.R. Co.  
 7 v. United States, 106 F.Supp. 999 (D. Ky. 1952), affirmed, 221 F.2d 698 (6<sup>th</sup> Cir. 1955).

8 Jurisdiction can be raised at any time, even on appeal. Therefore, the Motion is not  
 9 untimely.

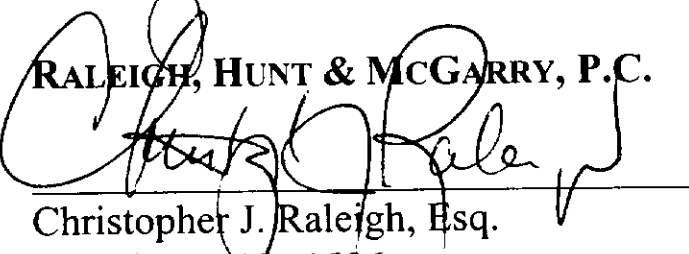
10  
 11 **II.**  
 12 **CONCLUSION**

13 The Court has already found Libro's original complaint only brought a claim under the  
 14 FELA, not a SAA claim. The SAA claim was not commenced within the three (3) year  
 15 statutorily required time. The SAA claim does not relate to the same conduct or occurrence as  
 16 the FELA claim and does not relate back to Plaintiff's original filing. UPRR was not on notice  
 17 of Libro's SAA claim until after the running of the statute of limitation. Therefore, Libro's  
 18 SAA claim should be dismissed. See 45 U.S.C. § 56; Fed.R.Civ.P. 12(h)(3).  
 19  
 20  
 21

22 <sup>5</sup>In an action under the FELA, commencement of the action within the statute of limitations is  
 23 a condition precedent to recovery rather than an affirmative defense. Billman v. Missouri Pacific  
 24 R. Co., 825 S.W.2d 525 (Tex. App. - Ft. Worth 1992), writ denied. A defendant is entitled to  
 the benefit of the limitation fixed by 45 U.S.C. § 56 without pleading it. Peterson v. Union Pac.  
Co., 8 P.2d 627 (Utah 1932).

Respectfully submitted this 11<sup>th</sup> day of September, 2003.

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**CERTIFICATE OF MAILING**

I HEREBY CERTIFY that on the 11<sup>th</sup> day of September 2003, I served a true copy of the above and foregoing **DEFENDANT'S REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S SECOND CAUSE OF ACTION** by causing same to be deposited in the United States Mail, at Las Vegas, Nevada, in a sealed envelope, first class postage thereon fully prepaid, addressed as follows:

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